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SUPREME COURT U.S.

IN THE

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OCTOBER TERM, A. D. 1918.

No. 714.

EUGENE V. DEBS,
Plaintiff in Error.

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

In Error to District Court of the United States for the Northern District of Ohio.

PETITION FOR REHEARING.

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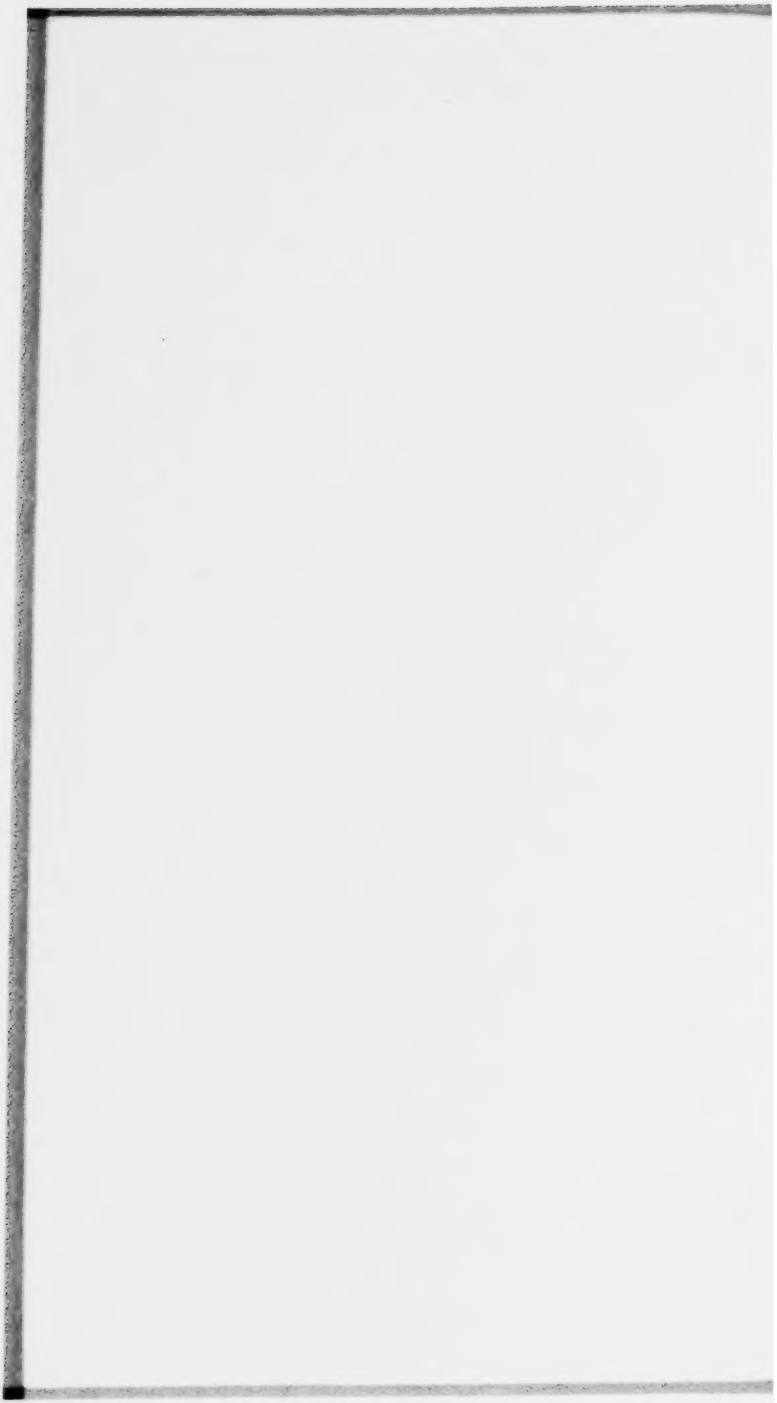

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MAY IT PLEASE THE COURT:

I.

This court has completely misconceived the issues presented by the indictment and plea thereto in this case. This court, referring to the address of Mr. Debs, says:

> "The main theme of the subject was Socialism, its growth and a prophecy of its ultimate success. With that we have nothing to do, but if a *part* or the manifest *intent* of the more *general* utterances was to *encourage those present to obstruct the recruiting service* and if in passages such encouragement was directly given the immunity of the general theme may not be enough to protect the speech."

It *was not charged* in the indictment or ch
in the trial against the defendant that he did
courage those present to obstruct the recruitin
vice" or that it was "part" or wholly his "in
to do so.

The defendant was not charged with aidi
abetting the "obstruction of the recruiting ser

There was no evidence that any person p
at the meeting or absent, obstructed, or eve
tempted to do so. The defendant, in person
charged with an *attempt* to *obstruct;* not as
ting some one. And in the absence of such a c
and proof to sustain it, the judgment of the
trict Court, as this court reasons, should
versed because the opinion of this court stat
entirely different theory of law than that
which the defendant was actually tried and
victed.

II.

This court further quotes defendant as fo

> "The master class has always declared th
> and the subject class has always fought th
> tles—that the subject class has had noth
> gain and all to lose, including their lives;
> the working class, who furnish the corpses
> never yet had a voice in declaring wa
> have never yet had a voice in declaring
> You have your lives to lose; you certainly
> to have the right to declare war if you co
> it necessary."

This court does not point out or argue in what way or how the statement

> "that the working class have no voice in declaring war and have never yet had a voice in declaring peace," etc.,

obstructs the recruiting or enlistment service. Mere speculation as to *remote* or *possible* effects upon the mind of an exceptional individual predisposed to obstruct, by a disinclination to enlist, would, we contend, be insufficient to justify a conviction, and it is a fact worthy to be called to this court's attention that it was not even intimated upon the trial that any person's mind had been affected contrary to the impulse of enlistment, much less induced to commit the offense of an actual obstruction.

III.

This court further quotes the defendant as follows:

> "He said that he had to be prudent, that he might not be able to say all he thought, thus intimating to his hearers that they might infer that they meant more."

The defendant was not charged with an undisclosed state of mind. The speaker was calling attention to the misinterpretation which might be placed upon his language, and what he said was this:

> "I realize (Printed Record page 3) that in speaking to you this afternoon there are certain limitations upon the right of free speech. I must be exceedingly careful, prudent, as to what I say and even more careful and prudent

> as to how I say it. I may not be able t
> I think, but I am not going to say anyth
> I do not think."

This shows the defendant did *not* propose any statement which would constitute a viol the law; that there were criticisms which *in mind* which he did *not* propose to state they *might* be interpreted as constituting an On what theory of justice can criminality ferred by speculating on the meaning of sta which *might* be misunderstood or construe infraction of the law. The opinion of this expressed upon this sentence of Mr. Debs amounts to the trial of a person for an und "state of mind." What was in his mind is gested by the court, so *we* are not able to the vice, or the evil of the "more" whic might infer." We do not know whether tha defendant's mind, if expressed, would cons *violation* of law or *not*, and submit that it ha been the law of this country that an undisclo tive constituted an element of crime until cision was rendered.

IV.

This court, *adopting another's opinion*, quotes the defendant as follows:

> "The defendant next mentioned Rose Stokes, convicted of attempting to cause ordination and refusal of duty in the forces of the United States and obstruct recruiting service"—"and if she was g was he."

To give this its proper setting in meaning, this court should have added the following which the defendant said in this connection:

> "Why she said that a government—a government could not serve both the profiteers and the victims of profiteers."

It was upon this that the defendant based his criticism of Mrs. Stokes' conviction, and added:

> "If she is guilty, so am I."

The defendant here expressed the thought that if Mrs. Stokes was guilty of a *felony* for stating that

> "the government could not serve both the profiteers and the victims of profiteers,"

then he was guilty of the content of this statement. It may be that a government *can*

> "serve both the profiteers and the victims of profiteers,"

some may believe this is possible; some may even believe that it is probable, but we submit that it should not be an element of criminality that a person's mind so operates that he believes a government

> "*cannot* serve both profiteers and the victims of profiteers";

and courageous persons who have expressed the opinion that a government cannot serve both the profiteers and the victims of profiteers—must admit that they are equally as guilty as the person referred to who has been convicted for making this statement. No court of review that we know of in this country has heretofore gone so far as this to supply criminal intent, or motive.

V.

ARGUMENT NOT EVIDENCE.

This court further quotes the defendar lows:

> "The defendant addressed the jury and while contending that his speech warrant the charges, said:
> "'I have been accused of obstructing I admit it. Gentlemen, I abhor war an oppose war if I stood alone.'"

Had this remark been made by counsel ming up before the jury, it would not have sidered in any sense as evidence—or the *a* of a fact. An argument by defendant o does not constitute *evidence* and the jury instructed. As the statement of Mr. Del the jury in his argument did not consti dence in his *favor*, on no just theory shou stitute evidence against him. An argume sworn testimony or subject to cross-exa and it is an axiomatic proposition of law th has no right to supply facts or evidence fr ments made in argument for the primar that it is not sworn to, and this applies t as well as a jury. The argument before a sists in a theory advanced and deductio from the evidence.

We insist that opposition to war, stated clusion, does not constitute an admissio structing recruiting. If this court decides position to war is an element of crime, th

sition to peace; opposition to a tariff; opposition to an impost tax; opposition to an inheritance law and opposition to prohibition can equally be interpreted as elements of criminality.

Opposition to war is a motive; it is not an intent. Motive and intent are clearly distinguishable.

VI.

MISTAKE OF FACT.

Referring to the cases of Ruthenberg, Wagenknecht, Baker, Rose Pastor Stokes and Kate Richards O'Hare, this court says:

> "The defendant purported to understand the grounds under which these persons were imprisoned."

This being so, then the defendant should have his conduct interpreted upon the "grounds" which he "understood" as the reason and basis for the conviction of the persons mentioned, and not on the records showing a different state of fact than that which he "understood." It is unjust to convict a person for what they do not understand the facts to be. It is the law that ignorance of the law excuses no one, but this is not the law when applied to *facts*. A person threatened by a footpad who is pointing a revolver is not required to know whether the revolver is loaded or empty before defending himself from a threatened attack; furthermore, the only "understanding" to be taken into account is that of the speaker and hearers in relation to the words about Stokes, O'Hare, Wagenknecht *et al.* used by the defendant.

VII.

MOTIVE AS AN ISSUE.

This court says, referring to the Anti-War Proclamation and Program, adopted at St. Louis, May, 1917, by the Socialist Party:

> "Defendant had stated that he approved of the platform in spirit and in substance and the defendant referred to it in his address to the jury *seemingly with satisfaction* and willingness that it should be *considered as evidence.*"

Does it become evidence because the defendant "seemingly" was willing that it should so become? Is law made this way? What a strange character is introduced here without credentials. The argument before a jury is not evidence under oath; a cross-examination is impossible. Counsel for defendant may admit facts upon which a court or jury may act in civil cases. But only sworn testimony will warrant a conviction in a criminal case, and this is so where a plea of guilty is entered. Courts should hesitate before going outside of the law to sustain a conviction even to accommodate a "seeming" willingness of a defendant.

The principles and spirit of the St. Louis Proclamation are that wars are the result of commercial rivalry and the economic development which makes the expansion for markets the inevitable process in a capitalist industrial society. The acceptance of this principle or theory, that is, that wars are primarily and basically industrial in character, cannot justify the inference that a person is obstructing re-

cruiting and enlistment because of the acceptance of this economic theory, whether it is true or false. May it not be that territorial expansion might really serve in many instances as an inducement to enter into the army and to carry out the expanding policy of a country?

This court, after quoting from the St. Louis War Proclamation (which was not referred to in the address of Mr. Debs), says that the defendant

> "accepted this view and this was a declaration of his duties at the time he made his speech is evidence that if in that speech he used words tending to obstruct the recruiting service he meant that they should have that effect. The principle is too well established and too manifestly good sense to need citation of the books."

The trial court (Printed Record page 265) was of the opinion, and so charged the jury, that what was in the mind of the speaker, his motive, could in no way excuse him, and of course by parity of reason in no way should it condemn him.

The trial court charged as follows:

> "The fact (Printed Record page 265) that his acts and utterances may have been made in furtherance of the purpose and policies of a political party or a political conviction is not, in the law, an excuse or defense."
>
> "You should (Printed Record page 276) be careful not to *mix* motive with intent. Motive is that which leads to the act; intent is that which qualifies it. Crime may be committed with what may be regarded as a good motive, or it may be committed with an evil motive, or it may be committed with a good and evil motive. To illustrate: The father of a large family steals bread for his starving children, and also

> to deprive the owner of its value. He may have two motives, one good, the other evil; but he is guilty, notwithstanding he has a *good motive* as well as an *evil motive*, for the law says he must not steal at all. So in this case, no matter if the defendant's *motive* and *purpose* may have been *good* and had been merely that which I have above stated as a part of his contention, namely, to convey information to his fellow citizens in the assumed exercise and in the belief that he was rightfully exercising the constitutional right of free speech, he is nevertheless guilty if he had the specific criminal intent to accomplish the acts and produce the effects and results forbidden by the specific provisions of the law to which I have called attention."

In the case of *United States* v. *Rose Pastor Stokes* the court instructed the jury that the motive of the defendant could not be taken into consideration by the jury in determining guilt or innocence. This court evidently is following a different rule than that adopted by the trial court. The distinction between motive and intent, so frequently confused, is best elucidated and stated in *People* v. *Molineaux*, 168 N. Y. 297, referred to in our brief in this case. This court erroneously bases, at least in part, its judgment upon the motive of the defendant. In the trial court we were denied the privilege of showing a good motive that would argue for acquittal. In the trial court this benefit was taken away, but this court in referring to the St. Louis Platform jumps into the mind of the defendant and from his state of mind advances a reason for sustaining the conviction. If it is good law to use motive for the purpose of sustaining a conviction then it should have

been equally as good law upon which the defendant was entitled to rely for the purpose of an acquittal. It is an *unjust* application of the law to say to a defendant your motive may furnish an ingredient justifying a *conviction* but your motive *cannot* furnish an ingredient *justifying your acquittal*, and this principle is too well established in law and too manifestly good sense to need citation of the books.

VIII.

WHO ARE IN MILITARY SERVICE.

The trial court (270) charged the jury

> "that all persons between the ages of 18 and 45, both inclusive, who are citizens of the United States and who have declared their intention to become citizens of the United States and who are not subjects of the nations with which we are at war and were then eligible for enrollment and enlistment in the recruiting service."

This instruction was broader than the apparent definition of this court, which says,

> "persons registered under the act of May, 1917, and subject to be called into active service were a part of the military and naval forces."

The jury had a right to accept and base their verdict upon the broader interpretation of the act given by the trial court. The record presented this question to the court, that is, are persons within the military and naval forces of the United States who are *not registered* and who are *not called* and who are not *enlisted? Is every citizen* in the United States *not* an alien between the ages of 18 and 45

within the military service of the United States? *This is an undetermined question by this court and it was presented in this case, and we submit we are entitled to a clear deciding of this matter.*

Respectfully submitted,

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